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In the Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS JUREN and EDWARD W. CROMEY, PETITIONERS

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTION PRESENTED

Whether, under the principles set forth in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), a federal agency may issue an administrative subpoena solely for purposes of advancing a criminal investigation, as long as the agency has not yet decided to refer the matter to the Department of Justice for criminal prosecution.

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v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

The undersigned counsel, on behalf of Dennis Juren and Edward W. Cromey, petition for a writ of certiorari to review the judgment of the Temporary Emergency Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals (App. A, *infra*, 1a-3a) is not yet reported. The opinion of the D.C. Circuit (App. B, *infra*, 4a-9a) is not reported. The oral opinion of the district court (App. E, *infra*, 16a-17a) is not reported.

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals (App. K, *infra*, 27a) was entered on September 9, 1982. A petition for rehearing was denied on September 28, 1982 (App. L, *infra*, 28a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. 1904 note, incorporated by Section 5(a)(1)(A) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 754(a)(1)(A).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in App. O, *infra*, 36a.

STATEMENT

Petitioners are vice presidents of the Tesoro Petroleum Corporation. They live and work in San Antonio, Texas. During the period from 1974 to 1981, Tesoro was the subject of a virtually continuous civil audit by the Department of Energy ("DOE") and its predecessor agencies. On July 17, 1981, apparently as part of a separate criminal investigation, DOE issued administrative subpoenas to petitioners, directing them to appear and testify in Washington, D.C. (App. N, *infra*, 32a-33a).

The subpoenas state that petitioners' testimony is sought

> in the investigation by the Department of Energy to determine the compliance of Arizona Fuels Corporation, Demenno Resources, Inc., Goldking Refinery, Ltd., Hill Petroleum, Inc., J & W Refining, Inc., Kenco Refining, Kern County Refining, Inc., Pioneer Refining, Inc., Refinery Associates, Inc., Refinery Development, Inc., San Joaquin Refining, Inc., The Tipperary Corporation, and Tesoro Petroleum Corporation, with the Mandatory Petroleum Price and Allocation Regulations, 10 C.F.R. Parts 205, 210, 211 and 212.

The subpoenas explain only that "[t]his investigation concerns purchases, sales, exchanges and processing of certain volumes of crude oil and the purchases, sales and exchanges of its refined products during the period September 1976 through December 1977" (App. N, *infra*, 32a).

Because the facts surrounding the issuance of the subpoenas strongly suggested an improper criminal purpose, and because the subpoenas were insufficiently specific to permit a reasoned judgment concerning the possibility of self-incrimination, petitioners declined to comply. Sub-

sequently, in January 1982, the government filed these subpoena enforcement actions in the United States District Court for the District of Columbia.

THE FACTUAL BACKGROUND OF PETITIONERS' SUBPOENAS

Tesoro is a major integrated refiner that was subject to DOE's Mandatory Petroleum Price and Allocation Regulations, promulgated pursuant to Section 4 of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. 753.[1] The EPAA authorized both civil and criminal penalties for regulatory violations, 15 U.S.C. 754(a), and DOE has established separate enforcement divisions to conduct civil and criminal investigations. See Economic Regulatory Administration ("ERA") ENFORCEMENT MANUAL (CCH) §§ 1.503.04, 1.503.07 (describing the functions of DOE's Program Operations Division, which is responsible for conducting civil investigations, and its Special Investigations Division, which is responsible for conducting criminal investigations).

During the seven-year DOE audit of Tesoro's compliance with EPAA regulations, DOE auditors had on-site access to virtually all of Tesoro's records relating to the company's crude oil refining and product marketing activities, including those records relating to Tesoro's processing agreements with other refiners during the period October 1976 through May 1977. DOE's Office of Special Counsel ("OSC"), which was charged with enforcement of the regulations as they applied to the 34 major refiners, apparently completed its on-site audit of Tesoro in late 1981.

While OSC was completing its civil audit in San Antonio, the Office of Special Investigations ("OSI") in Washington, D.C., began an apparently independent in-

[1] President Reagan lifted the controls applicable to crude oil and refined petroleum products on January 27, 1981. Executive Order 12287, 46 Fed. Reg. 9909 (1981). On September 30, 1981, the EPAA expired. 15 U.S.C. 760(g).

vestigation of suspected willful violations involving certain of Tesoro's processing agreements with other refiners.[2] In pursuit of this investigation, OSI issued the subpoenas *ad testificandum* that are the subject of this litigation.

Before the date for petitioners' appearances, their counsel learned that *Miranda*-type warnings were being given to witnesses testifying before OSI in connection with this investigation, and that at least one criminal referral to the Department of Justice had already occurred as a result of a similar investigation. See *United States* v. *Giant Industries, Inc.*, 4 EN. MGMT. (CCH) ¶ 26,324 (D. Ariz. 1981). Because OSC's auditors were even then conducting an intensive audit at Tesoro's headquarters, with the company's full cooperation, the issuance of formal subpoenas seeking to compel testimony from two senior executives seemed a highly unusual and unnecessary step. In an August 1981 letter to DOE, counsel for petitioner Juren expressed his concern regarding the apparent criminal purpose of the DOE subpoenas (R-14 to R-18).[3] DOE officials did not reply to this letter.

Indeed, petitioners heard nothing further regarding the subpoenas until the government began these actions. In ensuing discussions with counsel, attorneys for the government declined to provide assurances that petitioners are not "targets" of a criminal investigation. The government lawyers would say only that the planned interrogation of petitioners would involve "processing."

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[2] OSI is "[r]esponsible for the management of special investigations which center on possible willful violations of ERA regulations, and those which carry the possibility of referral to the Department of Justice for consideration of prosecution." ERA ENFORCEMENT MANUAL (CCH) § 1.503.07. Under Section 5(a) of the EPAA, 15 U.S.C. 754(a), a "willful" violation of the regulations is subject to criminal penalties.

[3] "R" refers to the record on appeal in the Temporary Emergency Court of Appeals, a copy of which has been lodged with the Clerk of this Court.

Moreover, DOE refused to permit petitioners to review in advance the documents on which they would be questioned. In response to petitioners' request for more specific information concerning the type of violation being investigated, OSI refused to go beyond the general regulatory references contained in the subpoena (R-99 to R-100).

In opposing DOE's subpoena enforcement petitions, petitioners contended that the subpoenas had been issued for an unlawful criminal purpose, and they sought discovery to establish that fact (R-168 to R-185). Petitioners also maintained that, because of DOE's failure to provide any coherent statement of the law applicable to the processing agreements regarding which they were to be questioned, they were unable intelligently to exercise or waive their privilege against compulsory self-incrimination and therefore were deprived of their Fifth Amendment rights. Finally, petitioners argued that Section 645 of the Department of Energy Organization Act ("DOEOA"), 42 U.S.C. (Supp. III) 7255, on which the government relied, did not confer jurisdiction on the district court in the District of Columbia to entertain the government's subpoena enforcement actions. Rather, petitioners argued, the actions should have been filed in the Western District of Texas, where petitioners live and work, and where the government's claims arose.

THE PROCEEDINGS BELOW

A. The District Court's Decision

Following a hearing (R-230 to R-273), the district court granted enforcement of the DOE subpoenas. The court provided little explanation of the reasons for its decision (App. E, *infra*, 16a-17a). The court noted its "deep sympathy" for the position confronting petitioners, but it concluded that the subpoenas should be enforced in light of DOE's representations that it has made neither a "criminal referral" to the Department of Justice nor a decision to make such a referral. The district court de-

nied petitioners' request for discovery regarding the purpose of DOE's investigation (App. F, *infra*, 18a-19a). The district court also denied a stay pending appeal (App. G, *infra*, 20a).

B. Petitioners' Appeals

Due to uncertainty regarding appellate jurisdiction, petitioners appeal to both the D.C. Circuit and the Temporary Emergency Court of Appeals ("TECA").[4] Petition-

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[4] Section 211(b)(2) of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. 1904 note, incorporated by Section 5(a)(1)(A) of the Emergency Petroleum Allocation Act of 1973 ("EPAA") 15 U.S.C. 754(a)(1)(A), provides that the TECA

> shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under [the ESA or the EPAA] or under regulations or orders issued thereunder.

Notwithstanding the broad language of Section 211(b)(2), which appears to track the "arising under" formula of 28 U.S.C. 1331, the reported cases establish that the TECA's jurisdiction is a limited "issue" jurisdiction that depends on whether the particular question in dispute involves some aspect of the ESA or the EPAA. See, *e.g.*, *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979); *Texaco, Inc.* v. *Department of Energy*, 616 F.2d 1193 (TECA 1979); *Gulf Oil Corp.* v. *United States Department of Energy*, 639 F.2d 766 (TECA 1981); *Spinetti* v. *Atlantic Richfield Co.*, 522 F.2d 1401 (TECA 1975); *United States* v. *Cooper*, 482 F.2d 1393 (TECA 1973).

When a case, or a segregable part of a case, does not involve the interpretation or application of one or both of those statutes, appeal from a district court's ruling lies in the appropriate circuit court of appeals rather than in the TECA. See, *e.g.*, *Bray* v. *United States*, 423 U.S. 73 (1975); *United States* v. *Uni Oil, Inc.*, 646 F.2d 946 (5th Cir. 1981), cert. denied, 102 S. Ct. 1254 (1982); *Coastal States Marketing, Inc.* v. *New England Petroleum Corp.*, *supra*; *Texaco, Inc.* v. *Department of Energy*, *supra*; *Gulf Oil Corp.* v. *United States Department of Energy*, *supra*; *United States* v. *Exxon Corp.*, 628 F.2d 70 (D.C. Cir.), cert. denied, 446 U.S. 964 (1980).

As the Second Circuit observed in *Coastal States*, 604 F.2d at 185, "[p]erhaps the clearest indication that the TECA and other courts

ers challenged the jurisdiction of the district court, the improper criminal purpose of the subpoenas, and the regulatory vacillation of DOE that made it impossible for petitioners to determine rationally whether to exercise their Fifth Amendment privilege against compulsory self-incrimination. The D.C. Circuit granted a stay pending appeal and set an expedited briefing schedule (App. D, *infra*, 12a-15a).

C. The Sulton Memorandum

While the appeals were pending, petitioners acquired new evidence that substantially bolstered their claim that the DOE subpoenas were issued for an improper criminal purpose. The evidence, initially obtained by Tesoro through a Freedom of Information Act request, is a DOE file memorandum prepared by the Assistant Solicitor of OSC, Gloria Sulton (App. M, *infra*, 30a-31a). Sulton is one of the two DOE officials before whom petitioners were commended to appear in response to the disputed subpoenas. The Sulton memorandum recounts a March 1979 meeting between DOE officials and attorneys in the Criminal Division of the Department of Justice. In addition to Sulton, the DOE officials present at the meeting included

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of appeals regard the TECA's jurisdiction as some form of 'issue' jurisdiction is the development of a system of bifurcated appeals from unitary judgments" (citing cases).

Of course, disputes have arisen concerning the proper characterization of particular issues. The present case involved issues concerning the district court's jurisdiction, the criminal nature of DOE's investigation, and petitioners' Fifth Amendment privilege against compulsory self-incrimination. The government argued that all of these issues fell within the TECA's exclusive jurisdiction. But none of the issues required any interpretation or application of the ESA or the EPAA.

The jurisdictional issue, in particular, turns on another statute altogether, Section 645 of the DOEOA, 42 U.S.C. (Supp. III) 7255. Accordingly, petitioners believed that at least the jurisdictional issue, and perhaps the other two issues as well, should be decided by the D.C. Circuit. To avoid waiving any rights, petitioners appealed all three issues to both courts of appeals.

Jeffrey Whieldon and Jerome Wiener, the two persons who have filed affidavits on behalf of the government in these enforcement actions (see R-198 to R-204).

The memorandum states that the meeting concerned "approximately 18 'cluster' audits involving the Entitlement Program * * *." In particular, the meeting focused on the so-called Tesoro/Young investigation, which was characterized as "the most fully developed case" of the 18. (Petitioners have repeatedly asserted their belief that the subpoenas now in dispute were issued in connection with one or more of the other 18 "cluster" audits, and the government has never disputed that assertion.) The purpose of the March 1979 meeting, as reflected in the Sulton memorandum, was informally to brief Criminal Division officials on the Tesoro/Young matter, and to discuss "additional steps to put the case in a posture for referral" (App. M, *infra*, 30a). DOE officials thought such a discussion "would be helpful for this case as well as those still under investigation" (*ibid.*) Among the subjects discussed were "potential problems with prosecution."

The memorandum on the March 1979 meeting concludes with the following paragraph (App. M, *infra*, 31a; emphasis added):

> The last question to be answered was the nature and extent of further work by DOE before referral to DOJ. It was agreed that *depositions of key persons should be taken before a referral is made.* OSC and OGC will work together in issuing subpoenas and scheduling the taking of testimony.

The Sulton memorandum thus shows that, in an investigation which either actually encompassed or at least closely paralleled DOE's present inquiry, the government deliberately delayed referral to the Department of Justice in order to gather further evidence through DOE subpoenas. More fundamentally, the memorandum demonstrates that DOE used its subpoena power in such a case solely for purposes of a criminal investigation. For these

reasons, petitioners moved in the district court for a new hearing under Fed. R. Civ. P. 60(b). Petitioners argued that, at the very least, the Sulton memorandum shows that petitioners are entitled to some measure of discovery concerning the purposes for which the present DOE subpoenas were issued.

D. The Denial of Petitioners' Rule 60(b) Motion

The district court denied relief, noting only that DOE had represented that the Tesoro/Young investigation had been closed, and that that investigation "involved different facts and was conducted separately from the investigation in which the subpoenas in the present case were issued" (App. J, *infra*, 26a). The court did not address the petitioners' contention that the Sulton memorandum revealed DOE to have used its administrative subpoena power improperly with respect to all 18 of the so-called "cluster" audits—of which the present investigation is apparently one.

E. The D.C. Circuit's Decision

In July 1982, the D.C. Circuit ruled that the district court did have jurisdiction to hear the government's enforcement actions (App. B, *infra*, 4a-9a). The court of appeals relied exclusively on Section 645 of the DOEOA and that provision's incorporation of Section 9 of the Federal Trade Commission Act, 15 U.S.C. 49. Although acknowledging the persuasive force of petitioners' argument to the contrary, the court held that it makes no difference whether Congress, in incorporating Section 9, "referred only to the subpoena issuance authority of the administrative agency" or "explicitly incorporated both the agency authority to issue subpoenas and the judicial authority to enforce subpoenas" (App. B, *infra*, 6a).[5]

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[5] In case the Court wishes to examine petitioners' jurisdictional argument in the courts below, copies of petitioner Juren's brief and reply brief in the D.C. Circuit, together with the petition for rehearing in that court, have been lodged with the Clerk of this Court.

The D.C. Circuit declined to pass on petitioners' substantive challenges to the DOE subpoenas, holding that those matters are "EPAA issues over which the Temporary Emergency Court of Appeals has exclusive jurisdiction" (App. B, *infra*, 8a).

F. The TECA's Decision

In September 1982, the TECA upheld the DOE subpoenas (App. A, *infra*, 1a-3a). Like the district court, the court of appeals was persuaded that the subpoenas should be enforced because "DOE had made no determination to refer the case for criminal investigation" (*id.* at 2a). Without referring to any of the evidence cited by petitioners to show that the DOE subpoenas were issued as part of a criminal investigation, the TECA declared simply that petitioners' allegations of improper purpose were not "buttressed with specific facts" (*id.* at 3a).

The TECA did not address the question of the district court's jurisdiction. The court's brief opinion does not reveal whether the TECA thought (a) that the district court had jurisdiction under Section 645 of the DOEOA; or (b) that, because the D.C. Circuit had already decided the jurisdictional issue, the TECA should not address it as well; or (c) that, because the jurisdictional question turns on a statute other than the ESA or the EPAA, the TECA lacks authority to review the matter.

G. The D.C. Circuit's Grant of Rehearing

On October 5, 1982, the D.C. Circuit granted petitioners' request for rehearing on the question of the district court's jurisdiction (App. C, *infra*, 10a-11a). The court vacated its July 1982 opinion, and announced that a new decision "will issue at some future date" on the basis of the written submissions already made.

REASONS FOR GRANTING THE PETITION

This case presents an important question concerning the authority of federal agencies to use their administrative subpoena power for criminal investigations. The government maintains, and the courts below held, that an agency may issue such a subpoena solely for purposes of a criminal investigation, as long as the agency has made no decision to refer the matter to the Department of Justice for prosecution. That is not the standard adopted by this Court in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978). Under *LaSalle*, the critical inquiry is whether the agency issuing a subpoena has made an "institutional commitment" to treat the matter as a criminal case. Here, there are substantial indications of such a commitment, all of which were disregarded by the courts below because of the courts' erroneous concentration on whether the agency had actually decided to refer the case to the Department of Justice. Intervention by this Court is needed to correct the lower courts' misapplication of *LaSalle*, and to ensure that the subpoena authority of DOE and other agencies is not used for purposes beyond those sanctioned by Congress.

Before turning to a further discussion of the *LaSalle* issue, the peculiar procedural context of this petition must be mentioned. The D.C. Circuit has granted rehearing, and has vacated its opinion sustaining the jurisdiction of the district court. The D.C. Circuit may well rule on rehearing that the government's enforcement actions against petitioners were not properly brought in the District of Columbia, and should have been brought in the Western District of Texas. In that event, this Court should grant the present petition, vacate the TECA's decision, and remand for reconsideration in light of the D.C. Circuit's ruling. On the other hand, if the D.C. Circuit adheres to its earlier decision and merely supports it with a new opinion, petitioners will seek review in this Court, and the Court can simultaneously

consider both the jurisdictional and substantive questions presented.

If this Court does not hold the present petition pending the outcome of the rehearing in the D.C. Circuit, undesirable consequences could ensue. If the Court were to grant this petition now, and the D.C. Circuit were subsequently to hold that the district court lacked jurisdiction, the precedential value of any decision this Court might render would be cast in doubt. This is particularly so if, as we believe, the TECA's appellate jurisdiction does not extend to issues under the DOEOA, and TECA therefore could not rule on the district court's jurisdiction (see note 4, *supra*).

If the Court were to deny this petition now, and the D.C. Circuit were subsequently to hold that the district court lacked jurisdiction, the government might well try to assert some res judicata or collateral estoppel effect of the TECA judgment in a subsequent enforcement action in the Western District of Texas. Petitioners, of course, would argue that the TECA decision could have no such effect in light of the holding on direct appeal that the district court lacked jurisdiction over the government's actions. These potential difficulties can easily be avoided, however, if this Court simply holds the present petition pending the D.C. Circuit's decision on rehearing.

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1. Returning to the reasons why this petition ultimately should be granted, we begin with the well-established proposition that an administrative subpoena may not be used solely to obtain evidence for a criminal prosecution. *United States* v. *LaSalle National Bank*, *supra*, 437 U.S. at 316; *Donaldson* v. *United States*, 400 U.S. 517, 533 (1971); *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964). As this Court explained in *LaSalle*, absent "an affirmative grant of summons authority for

purely criminal investigations," 437 U.S. at 317 n.18, an agency that issues an administrative subpoena to obtain evidence for a criminal prosecution is not exercising its subpoena power in the good-faith pursuit of a legitimate objective. *Id.* at 316 & n.18. The Court accordingly announced that it would "not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make [a criminal] referral and the [agency] merely would like to gather additional evidence for the prosecution." *Id.* at 316-317. "Similarly, the good-faith standard will not permit the [agency] to become an information-gathering agency for other departments, including the Department of Justice * * *." *Id.* at 317.

Although *LaSalle* involved a summons issued by the Internal Revenue Service, numerous courts have recognized that *LaSalle's* principles apply to other administrative agencies, including DOE. See *ICC* v. *Gould*, 629 F.2d 847 (3d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *NLRB* v. *Interstate Dress Carriers, Inc.*, 610 F.2d 99 (3d Cir. 1979); *United States* v. *Giant Industries*, 4 EN. MGMT. (CCH) ¶ 26,324 (D. Ariz. 1981) (applied to DOE); *United States* v. *Art Metal-U.S.A., Inc.*, 484 Supp. 884 (D. N.J. 1980) (applied to Inspector General of GSA). See also *SEC* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1387 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980) (SEC subpoenas must be issued in good faith, and not solely for criminal purposes).

2. Here, there are strong indications that the DOE subpoenas were issued to petitioners solely for a criminal purpose. Among these items of evidence are the following:

a. The administrative subpoenas were issued by OSI, the division within DOE that has expressly been assigned the responsibility for investigating suspected

criminal violations of DOE regulations. ERA ENFORCEMENT MANUAL (CCH) § 1.503.07.[6]

b. The subpoenas were issued after DOE's civil enforcement branch (OSC) had already completed its independent and unrelated investigation of Tesoro's compliance with the pertinent regulations.

c. OSI is seeking not simply further information, or even answers to specific questions concerning Tesoro's processing arrangements, but the personal testimony of petitioners in a way undeniably indicative of a highly focused criminal investigation. Government attorneys have announced that they will give petitioners *Miranda*-type warnings. DOE will provide no assurance that petitioners are not "targets" of a criminal investigation.

d. Although DOE has in its possession a large number of documents relevant to the transactions that are the subject of the subpoenas issued to petitioners, OSI has refused to meet with counsel to discuss the specific subject matter of the proposed interrogations or to provide petitioners with an opportunity to review in advance those documents regarding which they would be interrogated. OSI has also refused to disclose the types of violations being investigated, beyond the inscrutable references contained in the subpoenas.

e. The Sulton memorandum shows that in conducting its "Tesoro/Young investigation" DOE not only used its

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[6] The clear distinction between civil and criminal investigations within DOE, and the unquestionable focus of this investigation on suspected criminal violations, are dramatized by the recent internal reorganization of the ERA, which separated OSI entirely from the other enforcement arms. In that reorganization, DOE formalized the separation of the criminal investigatory authority reposing in OSI from the civil investigatory authority delegated to other divisions of the agency (R-102 to R-136). In anticipation of this reorganization, Mr. Rayburn Hanzlik, the Administrator of ERA, was quoted in the press describing Mr. Whieldon, the official who signed the subpoena issued to appellant Juren, as a "criminal expert" (R-138 to R-140).

subpoena power for a purely criminal investigation, but also consciously conspired with Criminal Division attorneys to delay a referral to the Justice Department until additional evidence could be gathered through administrative subpoenas. The Tesoro/Young investigation was only one of 18 entitlement "cluster" audits under investigation at the time of the Sulton memorandum; the government has not denied that petitioners' subpoenas were issued in connection with one or more of the other 18 such audits which were discussed at the March 1979 meeting. The DOE officials who participated in that meeting were precisely the same DOE officials who are now seeking to compel petitioners' testimony.

3. In response to the foregoing evidence, the government has offered only the equivocal affidavits of two DOE officials who attended the March 1979 meeting memorialized in the Sulton memorandum (R-198 to R-204). Notwithstanding the government's conceded obligation to make a prima facie showing that the subpoenas directed to petitioners did in fact have a lawful civil purpose, the affidavits do not contain any clear and unqualified statement to that effect. The affidavits appear to say only that the information sought through the subpoenas "may" be used to further a civil purpose, not that the subpoenas were actually issued with such a purpose in mind.

The affidavits contain lengthy generalized descriptions of the functions of OSI and the various possible purposes to which information gathered in a special investigation may be put. They also assert that there has been no criminal referral of, or decision to refer, this case to the Department of Justice. But, on the simple, direct, and most relevant issue of whether the disputed subpoenas were issued solely for a bona fide civil purpose, the affidavits are conspicuously silent.

4. Petitioners identified numerous indicators that the DOE subpoenas were intended solely to advance a crim-

inal investigation. The government responded with inconclusive affidavits. Yet the TECA panel found that petitioners had "presented no evidence that DOE acted improperly" (App. A, *infra*, 2a).

This ruling was possible only because the TECA, like the district court, viewed as dispositive the agency's representations that it had not yet decided to refer petitioners' case to the Department of Justice (App. A, *infra*, 2a; App. E, *infra*, 17a). That is not the critical consideration under *LaSalle*. The critical question is whether there has been an "institutional commitment" to conduct a purely criminal investigation. Here, the evidence of such a commitment was substantial. It was at least sufficient to warrant further inquiry through limited discovery regarding DOE's objectives. The courts below demurred, because they erroneously focused exclusively on whether a referral decision had been made.

LaSalle involved an IRS investigation of a taxpayer's tax liability. Unlike the investigating division of DOE, the investigating division of the IRS is not bifurcated. It is charged with uncovering both civil and criminal violations of the Internal Revenue Code. See 26 U.S.C. 7602; see also *Donaldson* v. *United States*, 400 U.S. 517, 535 (1971). Thus, in *LaSalle*, the only reliable indicator of whether an investigation was solely criminal may have been an actual decision to refer the case to DOJ.

Given the "institutional posture" of DOE, however, reliable indicators of a purely criminal investigation can be identified well in advance of an actual decision to refer. It is therefore not necessary to await a referral decision to ascertain the nature of the "institutional commitment." DOE has already made an institutional commitment, apparently with the full knowledge and approval of the Justice Department's Criminal Division, to conduct a criminal, as distinguished from a civil, investigation. At minimum, therefore, the government should

be required to make an affirmative showing that the administrative subpoenas are not being used "to expand [the government's] criminal discovery rights," or as a means of allowing the DOE "to become an information-gathering agency for * * * the Department of Justice" (437 U.S. at 317).

Both the district court and the TECA misunderstood the standard set forth in *LaSalle*. Had these courts recognized that *LaSalle* requires a judicial determination as to whether the agency has committed itself to a criminal investigation (whether performed internally or by the Department of Justice),[7] and recognized the differences in enforcement structure between DOE and the IRS, they could not have found petitioners' evidence irrelevant, or the government's representations conclusive. Those courts erred in accepting DOE's representation that no referral decision has been made as equivalent to the required showing that "the information sought will advance a civil, as distinguished from a criminal, investigation." In this case, the former simply does not establish the latter.

This Court should grant review to correct the dangerous misimpression that agency subpoenas automatically satisfy the *LaSalle* standard, as long as no referral decision has been made.

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[7] It can hardly be suggested, and the government has not attempted to suggest, that the prohibition of *LaSalle* extends only to criminal investigations conducted by DOJ. The Supreme Court's warning related to the type and purpose of the investigation being conducted, not to the identity of the agency conducting it.

CONCLUSION

The petition for a writ of certiorari should be held pending the D.C. Circuit's rehearing on the question of the district court's jurisdiction.

If the D.C. Circuit reverses, this petition should be granted, the judgment vacated, and the case remanded for reconsideration in light of the D.C. Circuit's ruling.

If the D.C. Circuit affirms, this petition should be granted.

Respectfully submitted.

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